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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/509,255	05/23/2005	Jean Fioramonti	045636-5081	1258

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EXAMINER

TONGUE, LAKIA J

ART UNIT PAPER NUMBER

1645

DATE MAILED: 07/17/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/509,255

Applicant(s)

FIORAMONTI ET AL.

Examiner

Lakia J. Tongue

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 April 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 6,7,10,11 and 15-18 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 6,7,10 and 11 is/are allowed.
- 6) ☒ Claim(s) 15-18 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's response filed on April 27, 2006 is acknowledged. Claims 6, 7, 10, 11 and 15-18 are pending and under consideration. Claims 1-5, 8, 9 and 12-14 have been canceled.

The text of those sections of Title 35, U.S. Code not included in this action can be found in the prior Office Action.

Rejection Withdrawn

1. In view of applicants' response the rejection of claims 6-14 under 35 U.S.C. 112, first paragraph on page 3, paragraph 3 is withdrawn.

Rejection Maintained

2. The rejection of claims 15-18 under 35 U.S.C. 102(e) as being anticipated by Ubbink et al is maintained for the reason set forth in the previous office action on page 5, paragraph 4.

The rejection was on the ground that Ubbink et al discloses a probiotic delivery system. Ubbink et al disclose that suitable probiotics for use in the composition include but are not limited to yeast such as *Saccharomyces* and bacteria such as the genera *Bifidobacterium*, *Streptococcus*, *Lactococcus* and *Lactobacillus*. Moreover, Ubbink et al disclose that *Lactobacillus farciminis* is a probiotic strain that may be selected (0057). Ubbink et al disclose that the present invention provides a particulate food, food additive, supplement or pharmaceutical product (0021). Lastly, Ubbink et al disclose that foodstuffs such as fermented milk products that contain probiotics are commercially available (0004). Claim limitations such as "for the treatment of pathologies of the digestive tube" are being viewed as limitations of intended use. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 458.

Since the Office does not have the facilities for examining and comparing applicants' composition with the composition of the prior art, the burden is on applicant to show a novel or unobvious difference

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between the claimed product and the prior art. See In re Best, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and In re Fitzgerald et al., 205 USPQ 594.

Applicant urges that a) the subject matter of claims 15-18 is entitled to the priority of FR 02/03891 and b) the priority date of March 28, 2002 predates the U.S. effective filing date of March 12, 2003.

The examiner would like to acknowledge applicants' certified translation of foreign application FR 02/03891. The instant application has a priority date of March 28, 2002. The examiner would like to note that Ubbink et al has a foreign priority date of March 12, 2002, which predates applicants' priority date.

Conclusion

3. Claims 6, 7, 10 and 11 are free of the prior art.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of


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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lakia J. Tongue whose telephone number is 571-272-2921. The examiner can normally be reached on Monday-Friday 7-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynette Smith can be reached on 571-272-0864. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


LJT
7/10/06


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